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8 UNITED STATES DISTRICT COURT
9 SOUTHERN DISTRICT OF CALIFORNIA

10 ANDRE JONES,

11 Plaintiff,

12 v.

13 CAPTAIN MORRERO; *et al.*,

14 Defendant.
15 _____

) Civil No. 08cv2316 L(WMc)

) **ORDER ADOPTING AS MODIFIED**
) **THE REPORT AND**
) **RECOMMENDATION; DENYING**
) **MOTION FOR TRO [doc. #7];**
) **GRANTING MOTION TO DISMISS**
) **ACTION [doc. #18]**
)

16 Plaintiff Andre Jones filed this action under 42 U.S.C. § 1983. The case was referred to
17 United States Magistrate Judge William McCurine, Jr. for a report and recommendation
18 (“Report”) pursuant to 28 U.S.C. § 636(b)(1)(B) and Civil Local Rule 72.1(d). The magistrate
19 judge recommended denial of the request for a TRO and dismissal of the case. Neither party
20 filed objections to the Report.

21 In reviewing a magistrate judge’s report and recommendation, the district court “shall
22 make a *de novo* determination of those portions of the report . . . to which objection is made,”
23 and “may accept, reject, or modify, in whole or in part, the findings or recommendations made
24 by the magistrate judge.” 28 U.S.C. § 636(b)(1). Under this statute, “the district judge must
25 review the magistrate judge’s findings and recommendations *de novo* if objection is made, but
26 not otherwise.” *United States v. Reyna-Tapia*, 328 F.3d 1114, 1121 (9th Cir. 2003) (*en banc*)
27 (emphasis in original); *see Schmidt v. Johnstone*, 263 F. Supp. 2d 1219, 1225-26 & n.5 (D. Ariz.
28

2003) (applying *Reyna-Tapia* to habeas review).

Plaintiff alleges that correctional facility officials were deliberately indifferent to his safety by failing to protect him from an attack by a documented enemy in violation of his Eighth Amendment rights; defendants interfered with his right of access to the courts; and defendants prevented him from having access to his personal property in violation of his due process rights.

The Report recommends dismissal of all of plaintiff's claims but does not indicate whether the dismissal is with or without prejudice. Accordingly, the Report and Recommendations is **ADOPTED** but with modifications.

IT IS ORDERED defendants' motion to dismiss is **GRANTED** as follows:

1. Plaintiff's claim for violation of his right of access to the courts is dismissed without prejudice¹;
2. Plaintiff's claim for failure to protect is dismissed without prejudice as to defendants Goff, Homer and Cortez;
3. Plaintiff's due process claim is dismissed with prejudice.
4. Dismissal of plaintiff's claims against defendants in their official capacity is granted with prejudice and denied without prejudice as to claims brought in defendants' individual capacity;
5. Dismissal of defendant Morrero is without prejudice.

IT IS FURTHER ORDERED plaintiff's motion for temporary restraining order is **DENIED**;

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¹ The Report states that plaintiff failed to "provide any evidence" as to his claim of access to the courts. (Report at 4.) Plaintiff must allege sufficient facts showing he has suffered an actual injury but he is not required to provide evidence in his complaint.

1 **IT IS FURTHER ORDERED** that plaintiff may file an amended complaint in
2 conformity with this Order on or before March 29, 2010.

3 **IT IS SO ORDERED.**

4 DATED: February 18, 2010

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6 
M. James Lorenz
United States District Court Judge

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8 COPY TO:

9 HON. WILLIAM McCURINE, JR.
10 UNITED STATES MAGISTRATE JUDGE

11 ALL PARTIES/COUNSEL
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